Court File No.: _____

COURT OF APPEAL FOR ONTARIO

BETWEEN:

JOANNE ST. LEWIS

Plaintiff
(Respondent)

and

DENIS RANCOURT

Defendant
(Appellant)

NOTICE OF APPEAL

July 4, 2014

Dr. Denis Rancourt
(Appellant)

THE DEFENDANT, DENIS RANCOURT, APPEALS to the Court of Appeal from the orders of Mr. Justice Michel Charbonneau, dated June 5 and June 6, 2014, made at Ottawa, Ontario, and also appeals the costs decision as to quantum and scale of costs. The impugned final judgement relates to damages, costs of trial, and a take-down and permanent-injunction order in a defamation action.

THE APPELLANT ASKS that the judgment be set aside and a judgment be granted as follows:

1. Ordering a new trial of the action with a new judge and jury;

2. Ordering that costs of the impugned trial be set aside as unjust, or awarded in favour of the defendant.

Costs of the appeal and other

3. The costs of this appeal on an appropriate scale;

4. Such further and other relief as the appellant may advise and this Honourable Court deems just.

THE GROUNDS OF APPEAL are as follows:

OVERVIEW

1. This appeal raises fundamental questions about:
   (a) the sufficient conditions that give rise to a reasonable apprehension of bias, regarding financial and institutional ties, in-court procedural decisions, the charge to the jury, and express findings from the bench;
   (b) the right of a litigant to argue an abuse-of-process remedy in a defamation trial, which was pleaded in pleadings that were not stuck out;

(c) the right of a defendant to have his pleaded defences and remedies considered by the jury in a defamation trial;

(d) whether the charge to the jury in a defamation trial can limit the jury members to either accept or reject specified meanings of the words complained of;

(e) whether an imbedded video that is an integral part of a web article ("blogpost") complained of and that is essential to the context of the alleged libel in a defamation action must be shown to the jury at trial;

(f) the limiting of a defendant's freedom of expression by a permanent injunction that forbids future unknown statements about the plaintiff, following a successful defamation action;

(g) costs policy principles, the *Charter* principle of freedom of expression, and the common law of awarding costs, for costs of a defamation trial against an impecunious defendant when there are no costs to the plaintiff.

BACKGROUND — CIRCUMSTANCES AND EVENTS AT TRIAL

2. This appeal is from judgments at trial of a defamation action filed in 2011. A pre-trial recusal motion was heard and decided on May 7, 2014. The trial judge did not recuse himself. The trial was held on 13 days or half-days between May 12, 2014, and June 6, 2014. Two further requests for recusal were made following in-court events during trial.

3. The defamation action is primarily about one blogpost published by the appellant (defendant) on February 11, 2011 — following the release of access to information documents — entitled "Did Professor Joanne St. Lewis act as Allan Rock's house negro?".

4. In the blogpost it is stated that the access-to-information documents suggest that Professor St. Lewis (respondent and plaintiff) acted like the "house negro" of Mr. Rock (the president of the University of Ottawa). The trial judge did not allow the access-to-information documents or any facts in evidence to be considered by the jury in support of the pleaded fair comment defence.

5. The term “house negro” was expressly defined in the blogpost via a 1963 speech by the iconic civil rights leader Malcolm X, which was embedded in video-form in the blogpost. The trial judge allowed that the jury not be shown the said video, which is an integral and essential part of the blogpost complained of.

6. The University of Ottawa is funding the plaintiff’s litigation “without a cap”. The Statement of Claim is for $1 million in damages and makes no claim of any actual damage to reputation, nor was any evidence for actual damage to reputation produced during discovery and prior to trial. The common law expressly allows a defendant to argue an abuse-of-process remedy in such circumstances of *no or minimal actual damage to reputation* — the “Jameel” remedy.

7. The trial started on May 12, 2014, with jury selection, followed by several Voir Dires, and an intervening party’s (University of Ottawa’s) motion to quash summonses to witnesses. The jury heard the opening statements of the parties on May 15, 2014. Witness testimony for the plaintiff was given in the afternoon of May 15, 2014, and continued for several days.

8. During his opening statement to the jury, the defendant explained his fair comment defence, and attempted to explain his abuse-of-process remedy when he was barred from doing so by the judge. The judge excused the jury and summarily struck out the defendant’s pleaded “Jameel” abuse-of-process remedy while the defendant was attempting to explain this remedy and the broad doctrine of abuse-of-process to the jury.

9. Following the summary striking out of his pleadings that had occurred on May 15, 2014, without abandoning his defence, the defendant expressly walked out of the courtroom on the morning of May 16, 2014, after arguing that the summary striking out was egregious and was additional evidence for a reasonable apprehension of bias. Thus, the defendant chose to be silent moving forward until he returned to the courtroom to hear

the jury verdict on June 5, 2014, and for the two final days of argument at trial when the motion for a permanent injunction and other matters were heard and decided.

10. At no time did the defendant abandon his defence or his party status. The defendant was treated like a party by the judge on return to the courtroom to argue the take-down and permanent-injunction order, except that in-court statements by the trial judge frustrated the defendant's access to exhibits and to court notifications, which occasioned a renewed request made on June 5, 2014, that the judge recuse himself for reasonable apprehension of bias.

11. The jury awarded $100,000 in general damages, and $250,000 in aggravated damages. Although strenuously argued by the plaintiff, no punitive damages were awarded. After releasing the jury on June 5, 2014, the judge entered the jury verdict, and ordered that costs would be awarded to the plaintiff (with quantum and scale to be determined later), and on June 6, 2014, made a take-down and permanent-injunction order.

JUDGE ERRED BY SUMMARILY STRIKING OUT THE DEFENDANT'S PLEADED ABUSE-OF-PROCESS REMEDY

12. The trial judge erred by summarily striking out a defendant's pleaded abuse-of-process remedy, while the defendant was attempting to explain the said abuse-of-process remedy to the jury during opening statements.

13. The abuse-of-process remedy (including the "Jameel" remedy as the main strand) had been argued and not struck out in a Voir Dire — heard and decided prior to opening statements — that struck out different and distinct paragraphs from the Statement of Defence.

JUDGE ERRED BY INSTRUCTING THE JURY THAT THERE WERE NO DEFENCES TO CONSIDER

14. The trial judge erred in his charge to the jury by instructing the jury that "The defendant has not introduced any evidence establishing a defence therefore there is no defence for you to consider."

15. In fact, the defendant had explained his pleaded fair comment defence to the jury in his opening statement, and had described the true facts relied on as including the SAC ("Student Appeal Centre") report, the plaintiff's evaluation report of the SAC report, and the access to information documents released by the SAC, all of which were linked in the blogpost complained of.

16. The said true facts relied on were amply proven by the plaintiff's evidence, and by the evidence of her witnesses. In addition, most or all of the said true facts relied on were of public knowledge to the readers of the U of O Watch blog, had been posted to the internet by the sources of the facts, and had been the subject of past blogposts and media reports as early as 2008.

17. Thus, the trial judge did not have the jurisdiction to instruct the jury that there was no defence for it to consider, but rather had a duty to explain the law of the fair comment defence, and the evidence that related to this defence. In the alternative, it was inconsistent with the interests of justice and incompatible with the *Charter* principle of freedom of expression, and thus an error of law, for the trial judge to instruct the jury that there was no defence for it to consider.

JUDGE ERRED BY LIMITING THE JURY TO EITHER ACCEPT OR REJECT SEVERAL SPECIFIED MEANINGS OF THE WORDS COMPLAINED OF

18. In the common law of defamation, the jury decides if the words complained of, in their ordinary meaning and in their context, are defamatory to a reasonable person. The jury is

the only arbitrator of the ordinary meaning(s) of the words complained of, in their context.

19. The trial judge erred by putting questions to the jury that involved answering, for each alleged "sting" (or statement) complained of, if yes or no the sting carried each of several meanings alleged by the plaintiff. In this scheme, the only way that the jury can answer whether or not a particular sting is defamatory, is to answer if the particular sting carries each of the meanings alleged by the plaintiff, and, if the sting carries the alleged meaning, whether the sting is therefore defamatory.

20. The said question scheme imposed on the jury by the trial judge to determine whether or not a given alleged "sting" (or statement) is defamatory:

    (a) suggests specific meanings alleged by the plaintiff;

    (b) constrains the jury to solely the meanings alleged by the plaintiff; and

    (c) artificially multiplies the number of possible ways that a given sting can be found to be defamatory.

    Such a scheme is inconsistent with the common law of defamation, the role of the jury, and by design cannot achieve a just balance between freedom of expression and protection of reputation. It is incompatible with the *Charter* principle of freedom of expression.

JUDGE ERRED BY ALLOWING THE JURY TO NOT BE SHOWN AN IMBEDDED VIDEO THAT WAS AN INTEGRAL AND ESSENTIAL PART OF THE BLOGPOST COMPLAINED OF

21. In defamation, the context of the words complained of is essential. The context prominently includes the medium of publication. An audio-visual document, central to the alleged libel, cannot be reduced to a transcript for the purpose of determination of defamation.

22. The main (February 11, 2011) blogpost complained of contains a video imbedded in the main text of the blogpost, which was expressly included to provide the "definition" of the term "house negro" — to provide the meaning of the term as used in the blogpost. The said video of 1-minute and 58-second duration, entitled "Malcolm X: The House Negro and the Field Negro", is entirely about the meaning of the term "house negro", and is of a speech recognized by scholars and experts as providing the modern meaning of the term.

23. The trial judge erred by referring the jury to meanings alleged by the plaintiff while not referring the jury to the meaning of the term "house negro" given in the context of the blogpost, where the term is expressly defined by use of the imbedded video.

24. The trial judge erred by allowing the jury to not ever be shown the imbedded video that provided the semantic and societal meaning of the pivotal term "house negro", in the context of the main blogpost complained of. This, despite the fact that the defendant had stressed the importance of the video in his opening statement.

JUDGE ERRED IN ORDERRING PERMANENT INJUNCTIONS AND TAKE DOWNS

25. The trial judge erred in making a permanent injunction restraining the defendant from publishing "any of the statements the jury has found to be defamatory" (paragraph-1 of the June 6, 2014, Order). It has not been determined that, in the different context of any supposed new publication, the said statements would be defamatory and without defence in law, as can only be determined by a trial on merits. An injunction against unknown future publications containing specified statements, or words from specified statements, is inconsistent with jurisprudence in the factual circumstances of the case. The test applied by the trial judge is incompatible with the common-law balance between freedom of expression and protection of reputation, and incompatible with the *Charter* principle of freedom of expression.

26. The trial judge erred in making a permanent injunction restraining the defendant from publishing "any defamatory statement about the Plaintiff" (paragraph-2 of the Order). An injunction against unknown future statements is inconsistent with jurisprudence in the factual circumstances of the case. The test applied by the trial judge is incompatible with the common-law balance between freedom of expression and protection of reputation, and incompatible with the *Charter* principle of freedom of expression.

27. The trial judge erred in ordering the defendant "to provide reasonable assistance to the Plaintiff" regarding removal or take down in databases, caches, and on "websites operated by third parties" (paragraph-4 of the Order). The order is ill-defined, impractical, lacking jurisdiction, overreaching, and contrary to *Charter* principles. The order extends beyond the common-law remedies for defamation, and is inconsistent with jurisprudence. It amounts to forcing the defendant to participate in convincing third parties to take down their own published materials that, in the different context of the third-party's publication, have not been determined to be defamatory and without defence in law, as can only be determined by a trial on merits.

28. The trial judge erred by ordering that the plaintiff "can apply for an Order requiring any person or company within the jurisdiction of this Court" to "remove or take down the articles" containing the statements found defamatory "or that contains a hyperlink to Exhibits #3 and #4" (paragraph-5 of the Order). It has not been determined that, in the different context of the supposed third-party's publication, the said statements would be defamatory and without defence in law, as can only be determined by a trial on merits. The Order also involves removing articles for containing specified hyperlinks, an absurd proposition akin to burning books for citing specific works in the references or footnotes.

29. The trial judge erred by making a permanent injunction restraining the defendant "from contacting or communicating with the Plaintiff, directly or indirectly, in any way or by any method" (paragraph-6 of the Order). There was no evidence that could reasonably justify this Order.

30. The trial judge erred by not giving due consideration and/or sufficient weight to the new evidence of exhibits #R24 and #R25 in making the permanent-injunction Order.

JUDGE ERRED BY NOT RECUSING HIMSELF FOR REASONABLE APPREHENSION OF BIAS

31. The trial judge erred by not recusing himself for reasonable apprehension of bias, following a pre-trial motion for recusal, and following in-court recusal requests pursuant to events at trial. The factual circumstances, the systemic and institutional setting, and the in-court events separately or together merited a recusal, in the interest of justice.

1. Pre-Trial Motion for Recusal

32. The evidence supporting a reasonable apprehension of bias presented in the pre-trial motion for recusal includes:

(a) The undisputed fact that the University of Ottawa is entirely funding the plaintiff's costs in the action;

(b) The undisputed fact that the University of Ottawa has numerous ties to the lawsuit, and intervened both in a defendant's motion to end the action and at trial;

(c) The fact that the University of Ottawa is expressly named in the Statement of Defence, in relation to both a defence and an abuse-of-process remedy;

(d) The fact that the subject matter of the lawsuit can negatively affect the reputation of the University of Ottawa, and thus the financial value of its scholarship funds and corporate image;

(e) The undisputed fact that the trial judge has all his university degrees (two degrees) from the University of Ottawa;

(f) The undisputed fact that the trial judge is a frequent and annual donator to the University of Ottawa;

(g) The undisputed fact that the trial judge was a founding co-partner in a law firm with the judge that was the main case management judge in the action;

33. Thus, there is a shared financial interest between the trial judge and the University of Ottawa, a shared reputational interest, and evidence for an apparent emotional tie.

34. The evidence supporting an appearance of bias occurs in circumstances where:

(a) The now Regional Senior Justice James McNamara in Ottawa had endorsed that he recused himself after careful consideration solely for having a degree from the University of Ottawa, in a separate case where the university was a party;

(b) The defendant had requested that then Regional Senior Justice Charles Hackland assign a judge from outside East Region and having no ties to the University of Ottawa to the case;

(c) The University of Ottawa has the only law school in the region, and the two major and largest law firms in Ottawa (Gowlings and BLG) are both involved in the case.

2. In-Court Request for Recusal Pursuant to Summarily Striking Out Pleadings

35. Following the in-court events of May 15, 2014, wherein the trial judge summarily struck out the defendant's pleaded "Jameel" remedy, on May 16, 2014, the defendant argued that the said events were egregious and constituted significant additional evidence in support of reasonable apprehension of bias.

36. The trial judge did not respond to the newly presented argument for recusal.

3. In-Court Request for Recusal Pursuant to Events at Trial to June 5, 2014

37. On June 5, 2014, the defendant made a fresh request for recusal based on the additional evidence supporting a reasonable apprehension of bias that includes:

(a) The trial judge's instructions to the Registrar on June 4, 2014, to not allow the defendant to consult trial exhibits in the courtroom on June 4, 2014, during the open-court hours to await the jury verdict;

(b) The fact that in open court on June 5, 2014, the trial judge expressly denied the defendant the "courtesy" of the court of informing the defendant of the date and time at which the jury would render its verdict, while the plaintiff was automatically granted the benefit of this practice;

(c) The fact that in open court on June 5, 2014, the trial judge expressly denied the defendant the procedural right to receive copies of all court-filed documents at trial, and all communications between the plaintiff and the trial judge.

38. These measures imposed by the trial judge interfered with the defendant's ability to return to the court and participate in the trial and trial motions.

4. Further Evidence at Trial for Reasonable Apprehension of Bias

39. Further events at trial that constitute evidence in support of reasonable apprehension of bias include:

(a) The spoken charge to the jury, which needlessly contained numerous recommendations for findings, given from the judge's position of authority;

(b) The June 6, 2014, oral "Reasons" for the permanent-injunction and take-down Order that contained many findings regarding the character of the defendant, alleged defendant's improper motives, and incorrect findings of fact, which are based on hearsay and which are not reasonably supported by evidence at trial;

(c) The manner and circumstances in which the defendant was ordered to attend a "show cause" hearing (scheduled on September 25, 2014) to convince the trial judge that there should not be a judgement of contempt of court.

5. Need for a Rule or Test for Automatic Recusal

40. There should be an automatic recusal rule or test for cases of a judge's established ties (such as donor status, alumnus status) with a major institution within the legal establishment of the region when that institution is significantly involved in the litigation, as a party, or intervening-party, or non-party. The Court has the jurisdiction to develop such a rule or test.

41. There should be an automatic recusal rule or test for cases of apparent shared financial interests (such as judge's donations and institutional funding of the lawsuit) or apparent emotional or personal ties (such as institutional reputation in-play and alumnus-status of the judge) between a trial judge and a party, or non-party substantively involved in the litigation. The Court has the jurisdiction to develop such a rule or test.

JUDGE ERRED BY AWARDING COSTS OF TRIAL TO THE PLAINTIFF

42. The trial judge's June 5, 2014, Order contains an order that the defendant pay costs of the trial in the action on a scale and in an amount to be determined. At the time of serving this Notice of Appeal, the costs decision as to scale and amount was not yet made. Thus, it is anticipated that the detailed arguments will be made to the Court in the appeal factum, and/or at the appeal hearing.

43. Depending on the outcome of the costs decision, the grounds in appealing the trial judge's costs decision can be anticipated to include the following:

(a) The costs award is contrary to the policy principles governing costs, regarding the indemnity principle, and the overriding consideration of whether a costs award is fair and reasonable in the particular circumstances;

(b) The costs award is contrary to the *Charter* principle of freedom of expression, regarding finding a just balance between freedom of expression and protection of reputation;

(c) The costs award blocks or frustrates the defendant from access to justice regarding appeal.

44. Specific grounds include:

(a) It is undisputed that the Plaintiff's costs in this private litigation are being entirely paid by the University of Ottawa on a voluntary basis and without any conditions — as such, there is nothing to indemnify;

(b) The funding agreement with the University of Ottawa raises the prospect of double recovery of costs — a prospect that is not mitigated by any evidence on the record;

(c) The defendant is impecunious, and the plaintiff has known this for several years from ordered disclosures and from an out-of-court cross-examination on financial means and assets held on October 14, 2011;

(d) The plaintiff has publicly expressed to the media an absence of need for indemnity or damages as (*Ottawa Citizen*, June 5, 2014, Exhibit #R24):

> Money or no money, St. Lewis said she was happy at the closure.
> "It feels fabulous," she said.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. Subsection 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;

2. The orders appealed from are final orders from a trial heard in the Superior Court of Justice;

3. Leave to appeal is not required, except for the decision awarding costs of trial in the event that the main appeal is not allowed.

DATED: July 4, 2013

Dr. Denis Rancourt
Appellant

[redacted]

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